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 11 BASFIELD

12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 KRISTINA ENNIX SLAUGHTER and
 16 MITCHELL SLAUGHTER,

17 Plaintiffs,

18 v.

19 CITY OF EMERYVILLE, EMERYVILLE
 20 POLICE DEPARTMENT, E. WHITE
 21 (#307) and S. ANDRETICH (#339),
 22 individually and in their official capacities;
 23 VICTORIA'S SECRET, CLAUDIA
 24 SOTO, ABERCROMBIE & FITCH, and
 25 MELISSA BASFIELD,

26 Defendants.

27 CASE NO. C08-01552-EMC

28 **NOTICE OF MOTION TO DISMISS BY
 DEFENDANTS ABERCROMBIE & FITCH
 AND MELISSA BASFIELD;
 MEMORANDUM OF POINTS AND
 AUTHORITIES; REQUEST FOR JUDICIAL
 NOTICE [FRCP 12(b)(6)]**

DATE: TBD
 TIME: TBD
 COURTROOM: TBD
 JUDGE: TBD

(Reassignment Pending)

NOTICE OF MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that defendants ABERCROMBIE & FITCH and MELISSA BASFIELD move the Court for an Order dismissing the complaint as against them without leave to amend, pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that it fails to state a claim upon which relief can be granted. Hearing will proceed in the above captioned Court located at 450 Golden Gate Avenue, San Francisco, California, at a date and time to be determined following reassignment of this case to a United States District Court Judge, as requested by one or more of the parties. (Upon reassignment, Moving Defendants will serve a

1 Re-notice of this Motion.)

2 The motion will be based on this Notice and on the Memorandum of Points and
 3 Authorities and Request for Judicial Notice set out below, and on such further showing as may be
 4 made at or before the hearing of the motion.

5 Dated: April 15, 2008

6 ROPERS, MAJESKI, KOHN & BENTLEY

7 By:

8 JAMES A. LASSART
 9 ADRIAN G. DRISCOLL
 10 SPENCER C. MARTINEZ
 11 Attorneys for Defendants
 12 ABERCROMBIE & FITCH and
 13 MELISSA BASFIELD

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

14 Plaintiffs allege that they were wrongfully detained and arrested by Emeryville Police
 15 after defendant Claudia Soto falsely reported that plaintiffs were involved in a shoplifting incident
 16 at defendant Victoria's Secret, Soto's employer. The plaintiffs (who are African American) were
 17 exonerated and released from custody one hour later, and generally allege here that their detention
 18 was the result of racial profiling. The alleged false report and wrongful detention constitute the
 19 sole basis for this action.

20 The complaint is clear that neither Abercrombie nor Basfield made the report or had any
 21 involvement in plaintiffs' subsequent detention and arrest. Abercrombie and Basfield are
 22 nevertheless named in five causes of action, each of which relates to a report plaintiffs allege was
 23 made by other defendants. These claims cannot stand, and Abercrombie and Basfield request that
 24 this motion to dismiss be granted.

II. ALLEGATIONS OF COMPLAINT

25 Plaintiffs are husband and wife, and are African American. Docket 1 ("Complaint") at
 26 ¶¶4, 5, 23. They allege that on March 24, 2007 they were driving home from the Bay Street Mall
 27

1 in Emeryville, California when they were pulled over by Emeryville Police, ordered out of their
2 car at gunpoint and arrested. (Id. at ¶¶24-30.)

3 After police completed their search of plaintiffs' vehicle, one of the officers informed
4 plaintiffs that a Victoria's Secret employee (defendant Claudia Soto) had reported a robbery at
5 that store by two African American females, and that one of the suspects had left the scene in
6 plaintiffs' vehicle. (Id. at ¶32.) Plaintiffs later learned that the alleged crime was a shoplifting
7 incident and not a robbery. (Id. at ¶33.) Plaintiffs allege that defendant Soto's report to police
8 regarding plaintiffs' involvement was false and was not based on her personal knowledge, and
9 that the report and resulting detention caused plaintiffs harm. (Id. at ¶¶35, 39-40.)

Defendant Basfield is an employee of an Abercrombie & Fitch store also located in the Bay Street Mall. (Id. at ¶15.) According to plaintiffs, Basfield observed defendant Soto walking behind an African American female and later advised Soto that the female had gotten into plaintiffs' vehicle. (Id. at ¶36.) Plaintiffs allege no other actions by Basfield. Plaintiffs include no allegations against Abercrombie except a general averment that Abercrombie is vicariously liable for Basfield's actions.

III. ARGUMENT

A. Standard On This Motion

In considering a Rule 12(b)(6) Motion to Dismiss, the Court must generally assume as true all material allegations in the complaint as well as reasonable inferences to be drawn from them. (Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998).) However, the Court need not accept as true conclusory allegations or legal characterizations, and should not accept unreasonable inferences or unwarranted deductions of fact. (Transphase Systems, Inc. v. Southern Calif. Edison Co., 839 F.Supp. 711, 718 (CD Cal. 1993).) A Court need not "swallow the plaintiff's inventive hook, line and sinker; bald assertions, unsupportable conclusions, peniphrastic circumlocutions, and the like need not be credited. (Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).)

1 B. **Plaintiffs Fail To State Any Valid Claim Against Basfield and Abercrombie**

2 Plaintiffs allege five causes of action against Basfield and Abercrombie: (1) California
 3 Government Code §815.2 and Respondeat Superior Liability; (2) Intentional Infliction of
 4 Emotional Distress; (3) Invasion of Privacy; (4) Violation of California Civil Code §46—Slander
 5 Per Se; (5) Negligence and Negligence Per Se. Each incorporates by reference, and is premised
 6 upon, the "wrongful acts" by Basfield and Abercrombie – apparently that Basfield advised Soto
 7 that a woman had gotten into plaintiffs' car. To the extent plaintiffs' claims are appropriately
 8 asserted against Basfield and Abercrombie at all, they fail to state any valid claim for relief
 9 against these defendants.

10 1. **California Government Code §815.2 and Respondeat Superior Liability –
 Fifth Cause of Action**

11 California Government Code §815.2 allows a public entity to be held liable in appropriate
 12 circumstances for injuries proximately caused by acts or omissions of its employees. Cal. Gov.
 13 Code §815.2. Basfield is an employee of Abercrombie, not any public entity. The statute is
 14 inapplicable to these defendants, directly or vicariously through the doctrine of respondeat
 15 superior.

16 2. **Intentional Infliction of Emotional Distress – Eighth Cause of Action**

17 The elements of a prima facie case of intentional infliction of mental distress are (1)
 18 outrageous conduct by the defendants; (2) intent to cause or reckless disregard of the probability
 19 of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate
 20 causation of the emotional distress. (Kiseskey v. Carpenters' Trust for So. Cal., 144 Cal.App.3d
 21 222, 229 (1983); Christensen v. Superior Court, 54 Cal. 3d 868, 903 (1991).) Plaintiffs fail to
 22 allege facts satisfying three of these elements: outrageous conduct, intent and causation.

23 Accepting plaintiffs' allegations as true, Basfield did nothing except tell Soto that an
 24 unidentified woman got into plaintiffs' car. Plaintiffs allege no facts showing "outrageous
 25 conduct" by Basfield or Abercrombie, intent to inflict severe emotional distress, or any causative
 26 link between Basfield's supposed actions and plaintiffs' injuries. Plaintiffs' claim that Basfield
 27 committed these otherwise innocuous actions out of race-based animus is a conclusion not

1 supported by the facts alleged, nor does it cure the lack of causation apparent on the face of the
 2 complaint. (The allegedly false report to police was by defendant Soto, primarily relating to
 3 events Soto claims she witnessed at a Victoria's Secret store. Basfield had no hand in the report
 4 or plaintiffs' subsequent detention. Complaint at ¶38.)

5 **3. Invasion of Privacy – Ninth Cause of Action**

6 In their Ninth Cause of Action, plaintiffs allege that all of the defendants "intentionally
 7 intruded on Plaintiffs' solitude, seclusion, private affairs or concerns in a manner that was highly
 8 offensive." (Complaint at ¶80.) As to Basfield and Abercrombie, this Cause of Action makes no
 9 sense. Accepting plaintiffs' allegations as true, Basfield observed an African American female
 10 outside a Victoria's Secret store – i.e., in a public place – and told defendant Soto that the woman
 11 got into plaintiffs' car. There was no invasion of privacy by Basfield or Abercrombie.

12 **4. Slander Per Se – Tenth Cause of Action**

13 By definition, slander is a false and unprivileged communication that has a natural
 14 tendency to injure or that causes special damage. (Cal. Civ. Code §46; Mann v. Quality Old Time
 15 Service, Inc., 120 Cal.App.4th 90, 106-07 (2004).) An essential element is that the publication in
 16 question contains a false statement of fact. (Ellenberger v. Espinosa, 30 Cal.App.4th 943, 952
 17 (1994).)

18 Plaintiffs do not allege that Basfield made any false communication – her alleged
 19 statement to defendant Soto that she had observed a female enter plaintiffs' vehicle was true. Nor
 20 did Basfield's alleged statement have a "natural tendency" to injure plaintiffs. There was
 21 therefore no slander by Basfield on the face of plaintiffs' complaint. Basfield's alleged ill-motive
 22 for making a true statement of fact to Soto is irrelevant.

23 **5. Negligence and Negligence Per Se – Thirteenth Cause of Action**

24 Plaintiffs allege that all defendants breached a duty of care to them, and were therefore
 25 negligent, by (1) conducting unlawful detentions and arrests; (2) violating the right to equal
 26 protection of the laws; (3) violating the right to due process; (4) violating plaintiffs' right to be
 27 free from bodily restraint or harm, from personal insult, and from defamation, and (5) failing to
 28 adequately train and supervise its employees. (Complaint at ¶¶93-94.) Of these, items (1)

1 through (3) have nothing to do with defendants and items (4) and (5) have little, if any, possible
 2 application to Basfield and Abercrombie.

3 Plaintiffs plead no facts demonstrating any duties owed by Basfield or Abercrombie
 4 which they breached, causing plaintiffs harm. (Burgess v. Superior Court, 2 Cal.4th 1064, 1072
 5 (1992) (traditional elements of negligence are duty, breach of duty, causation and damages).)
 6 Neither Basfield nor Abercrombie engaged in any act of "personal insult" or defamation. (See
 7 supra.) Plaintiffs also do not set forth facts suggesting that Abercrombie was somehow negligent
 8 in hiring and training its employees. The complaint instead focuses on this issue to the
 9 Emeryville Police, and Victoria's Secret's employees' alleged false report to them. See Complaint
 10 at ¶37.

11 **C. The Complaint Should Be Dismissed With Prejudice**

12 A complaint should be dismissed with prejudice where the plaintiff cannot allege other
 13 facts consistent with the challenged pleading that would cure the deficiency. *Firestone v.*
 14 *Firestone*, 76 F.3d 1205, 1209 (DC Cir. 1996). That is the case here. Basfield and Abercrombie
 15 cannot be held liable for her alleged act of reporting what she saw to another defendant, no matter
 16 the theory offered by plaintiffs. Plaintiffs' complaint should therefore be dismissed with
 17 prejudice.

18 **IV. CONCLUSION**

19 For the foregoing reasons, defendants Basfield and Abercrombie & Fitch respectfully
 20 request that this motion be granted in full, and that plaintiffs' complaint against them be dismissed

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1 with prejudice.

2 Dated: April 15, 2008

3 ROPERS, MAJESKI, KOHN & BENTLEY

4 By:

5 JAMES A. LASSART
6 ADRIAN G. DRISCOLL
7 SPENCER C. MARTINEZ
8 Attorneys for Defendants
9 ABERCROMBIE & FITCH and
10 MELISSA BASFIELD

Ropers Majeski Kohn & Bentley
A Professional Corporation
San Francisco

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1 CASE NAME: Slaughter, et al. v. Emeryville, et al.

2 ACTION NO.: 08-CV-01552-EMC

3 PROOF OF SERVICE

4 METHOD OF SERVICE

- 5 First Class Mail Facsimile Messenger Service
- 6 Overnight Delivery E-Mail/Electronic Delivery

- 7 1. At the time of service I was over 18 years of age and not a party to this action and a Citizen of
the United States.
- 8 2. My business address is 201 Spear Street, Suite 1000, San Francisco, CA 94105.
- 9 3. On April 15, 2008 I served the following documents:

10 **NOTICE OF MOTION TO DISMISS BY DEFENDANTS ABERCROMBIE &
11 FITCH AND MELISSA BASFIELD; MEMORANDUM OF POINTS AND
12 AUTHORITIES; REQUEST FOR JUDICIAL NOTICE [FRCP 12(b)(6)]**

- 13 4. I served the documents on the persons at the address below (along with their fax numbers
and/or email addresses if service was by fax or email):

14 Jivaka Candappa
15 Law Office of Jivaka Candappa
46 Shattuck Square, Suite 15
16 Berkeley, CA 94704
Phone: (510) 981-1808
17 Fax: (510) 981-1817
Email: jcandappa@sbcglobal.net
(Attorney for Plaintiffs)

18 Dale L. Allen, Jr.
Low Ball & Lynch
505 Montgomery Street, 7th Flor
19 San Francisco, CA 94111
(415) 981-6630
(415) 982-1634
Email: dallen@lowball.com
(Attorney for Defendants CITY OF
EMERYVILLE, EMERYVILLE POLICE
DEPARTMENT; E. WHITE (#307); S.
ANDRETICH (#339)

20
21 Victoria's Secret
22 5672 Bay Street
23 Emeryville, CA 94608

Claudia Soto
Victoria's Secret
2556 Somersville Road
Antioch, CA 94509

- 24 5. I served the documents by the following means:

- 25 a. By United States mail: I enclosed the documents in a sealed envelope or package
26 addressed to the persons at the addresses specified in item 4 and placed the envelope for
collection and mailing, following our ordinary business practices. I am readily familiar with this
27 business's practice for collecting and processing correspondence for mailing. On the same day
that correspondence is placed for collection and mailing, it is deposited in the ordinary course of
business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

1 b. By overnight delivery: I enclosed the documents in an envelope or package
2 provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4.
3 I placed the envelope or package for collection and overnight delivery at an office or a regularly
utilized drop box of the overnight delivery carrier.

4 c. By messenger: I served the documents by placing them in an envelope or package
5 addressed to the persons at the addresses listed in item 4 and providing them to a messenger for
6 service. (Separate declaration of personal service to be provided by the messenger.)

7 d. By fax transmission: Based on an agreement between the parties and in
8 conformance with Fed. Rules Civ. Proc. rule 5, and/or as a courtesy, I faxed the documents to the
9 persons at the fax numbers listed in item 4. (Separate Proof of Transmission by Fax to be
provided.)

10 e. By email or electronic transmission: Based on an agreement between the parties
11 and/or as a courtesy, I sent the documents to the persons at the email addresses listed in item 4. I
12 did not receive, within a reasonable time after the transmission, any electronic message or other
indication that the transmission was unsuccessful.

13 I am employed in the office of a member of the bar of this court at whose direction the
14 service was made. I certify under penalty of perjury that the foregoing is true and correct.

15 Date: April 15, 2008

16 _____
17 Michelle Yee
18 _____
19 Type Name

20 
21 _____
22 Signature